SUPREME COURT, U. S.

DEC 8 1969

JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

No. 936

WILLIAM NAY WOOD,
Respondent,

vs.

SHERMAN H. CROUSE, Warden, Kansas State Penitentiary, Lansing, Kansas,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 2

Jurisdiction 2

Questions for Review 2

Constitutional Provisions Involved 3

Statement of Facts 3

Reasons for Granting the Writ 7

The Search Conducted of Respondent's Car Twenty Minutes After His Arrest Was Valid As Being Incidental to and Substantially Contemporaneous with That Arrest 8

Conclusion 17

Appendix—

Opinion, United States Court of Appeals, Tenth Circuit A1

Memorandum of Decision, United States District Court for the District of Kansas A10

Table of Cases

Arwine v. *Bannan*, 364 F.2d 458 (6th Cir. 1965) 15

Chimel v. *California*, 395 U.S. 752 (1969) 8, 9

Cooper v. *California*, 386 U.S. 58 (1967) 8, 13

Crawford v. *Bannan*, 336 F.2d 505 (6th Cir. 1964) 15

Desist v. *United States*, 394 U.S. 244 (1969) 8

Dyke v. *Taylor Implement Manufacturing Company, Inc.*, 391 U.S. 216 (1968) 16

Leffler v. *United States*, 409 F.2d 44 (8th Cir. 1969) 15

McCoy v. *Cupp*, 298 F. Supp. 329 (D.C. Ore. 1969) 15

People v. *Migara*, 236 N.E.2d 693 (Ill. 1968), *cert. denied* 393 U.S. 925 (1968) 16

People v. *Weaver*, 243 N.E.2d 245 (Ill. 1968), *cert. denied* 395 U.S. 959 (1969) 16

Preston v. *United States*, 376 U.S. 374 (1964) 8, 12, 13

Rabinowitz v. *United States*, 339 U.S. 56 (1950) 8

Sisk v. *Lane*, 331 F.2d 234 (7th Cir. 1964) 16

State v. *Wood*, 190 Kan. 778, 378 P.2d 536 (1963) 2

State v. *Wood*, 197 Kan. 241, 416 P.2d 729 (1966) 2

United States ex rel. Chambers v. *Maroney*, 408 F.2d 1187 (3rd Cir. 1969) (certiorari granted, 38 L.W. 3173 (Nov. 11, 1969)) 15

United States, ex rel. Foose v. *Rundle*, 389 F.2d 54 (3rd Cir. 1968) 14, 15

United States v. *Dento*, 382 F.2d 361 (3rd Cir. 1967), *cert. denied* 389 U.S. 944 (1967), *rehearing denied* 389 U.S. 997 (1967) 14

United States v. *Thomas*, 289 F. Supp. 364 (D.C.S.D. N.Y. 1968) 15

United States v. *Harvey*, 397 F.2d 526 (7th Cir. 1968) 16

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment 4 3

IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in *Wood* v. *Crouse,* No. 125-68, on October 7, 1969.

OPINIONS BELOW

On March 20, 1962, Wood was convicted by a jury in the District Court of Barton County, Kansas, of burglary in the second degree, grand larceny, forgery, and two counts of offering to pass a forged instrument. A *pro se* appeal to the Kansas Supreme Court affirmed the conviction. *State* v. *Wood*, 190 Kan. 778, 378 P.2d 536 (1963). Wood was permitted a second appeal, this time represented by appointed counsel, but the conviction was again affirmed. *State* v. *Wood*, 197 Kan. 241, 416 P.2d 729 (1966). A petition for habeas corpus was filed in the Federal District Court for the District of Kansas, and after initial decisions concerning procedural questions, an evidentiary hearing was set and judgment was rendered denying the relief requested[1] by The Honorable George Templar, District Judge, on July 1, 1968. The United States Court of Appeals for the Tenth Circuit reversed the district court's decision on October 7, 1969. Its opinion is not printed as of this date, and is reproduced in the appendix, *infra*, p. A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 7, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS FOR REVIEW

1. Is a search of the interior of the vehicle respondent was driving twenty minutes after he had been arrested for burglary and attempted passing of forged instruments invalid because not conducted at the scene of the arrest, but after respondent and the car had been transported to the nearest police station?

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1. The opinion is unreported and appears in the appendix, *infra*, p. A10.

2. Is the feasibility of obtaining a search warrant the primary consideration in determining whether or not a search conducted on December 30, 1961, is incidental to and contemporaneous with a valid arrest and therefore itself valid?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

The facts in this habeas action were essentially agreed upon. Wood presented no evidence other than the transcripts of the state court proceedings in his habeas hearing. We shall therefore take our statement of facts from the testimony presented at the state criminal trial.

On March 20, 1962, Wood was convicted by a jury in the District Court of Barton County, Kansas, of burglary in the second degree, grand larceny, forgery, and two counts of offering to pass a forged instrument.

Sometime between the hours of approximately 5:00 p.m. on December 29, 1961, and 8:45 a.m. on December 30, 1961, the offices of the Dr. Pepper Bottling Company located in Great Bend, Barton County, Kansas, were burglarized. Entry was gained by breaking a window in the south room of the two rooms of the office. Missing from the office were a Remington Rand typewriter, a check protector machine and a book of numbered checks printed with

the name "Dr. Pepper Bottling Company." (T. 16, 21-22)[2] State's exhibits 1, 2, 3 and 4 were part of the checks missing as a result of the burglary. (T. 47)

We will omit a summary of the evidence connecting Wood to the burglary since it is not relevant to the search and seizure issue considered by the courts below.

On December 29, 1961, about 8:00 p.m., Mr. Ellis Wright was confined in the Great Bend city jail for drunkenness. He testified that he loaned his car to Wood (T. 55) and told Wood to take the car to Ward's Motel and Trailer Court to get his brother. (T. 57) Wright's brother then testified that the 1954 Pontiac was brought to him, whereupon Wood told him that he was to take the car to a certain place and there leave it. (T. 62) The car was recovered by Wright on December 31. (T. 58)

One Jesse E. Wyatt, a codefendant in the state criminal trial, on December 30, 1961, asked Wood to take him to Lyons, Kansas (T. 176), about 30 miles east of Great Bend on U. S. Highway 56. Wood agreed to do so and used the automobile he had earlier borrowed from Wright. En route to Lyons from Great Bend, they stopped in Ellinwood where Wyatt unsuccessfully attempted to cash bottling company checks at two grocery stores. (T. 68-69, 74-75)

Wyatt first attempted to cash a Dr. Pepper Bottling Company check in the H. & H. IGA Store in Ellinwood. (T. 64, 65, 68, 69) The check was not cashed at this store. (T. 69) Wyatt then proceeded to the C. O. Mammel Food Store in Ellinwood, where he attempted to cash the same check around 6:30 in the evening. (T. 74) The assistant manager of this store testified that a Dr. Pepper

2. The state criminal trial transcript has been denoted T for identification purposes.

Bottling Company of Great Bend check made payable to Mr. Jesse Wyatt was presented but that the check wasn't cashed. (T. 74-75) Immediately after Wyatt left the store, Mr. Bieberle, the assistant manager, told one of his employees to run out and get the license number of the car while he went to the phone and called the Ellinwood police. (T. 76) He called the police because he had heard about Dr. Pepper Bottling Company checks being stolen from the Great Bend plant and he presumed this was one of them. (T. 76)

Elmer Burgardt, the employee who went outside to check on the license plate of the car, testified that he saw a 1953 or 1954 Pontiac, two-tone blue, with the left tail-light out, and reported this fact to Mr. Bieberle. (T. 80) The car proceeded east on Highway 56. (T. 80)

Sheriff Paul Kline, of Rice County, Kansas—Lyons, Kansas, is located in Rice County—testified that just prior to 7:00 o'clock of the evening of *December 30, 1961,* he received a phone call from his radio dispatcher saying that the Ellinwood police had asked his office to be on the lookout for a 1953 or 1954 two-tone colored Pontiac with the left tail-light missing, last reported headed east on U. S. Highway 56. (T. 102-103) The sheriff was advised that an occupant of this vehicle had tried to pass a check reportedly taken in the Dr. Pepper Bottling Company burglary in Great Bend. (T. 103) Sheriff Kline proceeded several miles west of Lyons, Kansas, on U. S. Highway 56 and was checking vehicles as they passed. He noted a vehicle that resembled the description given by the Ellinwood police and commenced following the car. He took down the license plate number, and advised co-officers that he would stop the car at the west edge of the city of Lyons. (T. 103) As he caught up with the car, he discovered that it was a 1954 Pontiac bearing Pawnee County license num-

ber 3811, with the left light of the tail-light out. The car was a 1954 two-tone blue Pontiac. (T. 104)

The sheriff stopped the vehicle on the west edge of Lyons, determined that Wood was driving the automobile and that he was accompanied by Wyatt. (T. 104) The sheriff, accompanied by an officer Samuels, whom the sheriff had asked to meet him at the west edge of Lyons (T. 103), immediately arrested Wood when he got out of the car. (T. 109) Officer Samuels was directed immediately to search Wood (T. 105), which he did. He discovered a Dr. Pepper Bottling Company check in Wood's shirt pocket (State's Exhibit 4). This check was subsequently admitted in evidence at Wood's trial *without objection.* (T. 106, 108) There was no search of the automobile proper at this time by either police officer. Wood was immediately taken from the arrest site to the county jail in the sheriff's automobile and Wyatt was taken to jail by Samuels in the latter's police car. (T. 116) Wright's car was left at the west edge of Lyons.

When Kansas Highway Patrol Trooper John Murphy went on duty at approximately 6:30 p.m. on December 30, 1961, he was aware of a broadcast stating that checks had been stolen from the Dr. Pepper Bottling Company in Great Bend and that an attempt had been made to pass one of these checks in Ellinwood, Kansas. (T. 119-120) He also had a description of the vehicle being driven by the check-passers. (T. 120)

Trooper Murphy arrived at Lyons between 7:30 and 8:00 o'clock p.m. and saw, on the outskirts of town, an automobile that matched the description of the car the suspects had been driving. (T. 120) Trooper Murphy was in communication with the sheriff regarding the search of the car. The sheriff sent the keys out to Murphy and he drove it to the county jail, where, at the direction of the

sheriff, he searched the interior of the automobile. (T. 121) At the time the search was conducted, Murphy was aware that Wood had been arrested and placed in jail. He did not have a search warrant. Murphy estimated that the search was conducted twenty minutes after the arrest. (T. 126) During the search, Murphy found what later were admitted in evidence as State's Exhibits 1, 2 and 3, which were Dr. Pepper Bottling Company checks bearing numbers within the series stolen. Trooper Murphy testified that in the search of the automobile, he was looking for items connected with the burglary committed at the bottling company in Great Bend, Kansas. (T. 125, 131) The car was searched almost immediately upon Trooper Murphy's arrival at the county jail. (T. 123)

Trooper Murphy did not have to unlock the car when he entered it to drive it to the county jail. (T. 129) Trooper Murphy found the checks under the right front seat and under the floor mat on the right-hand side. (T. 131)

On July 1, 1968, the United States District Court for the District of Kansas, after considering the transcripts of the various state court proceedings and the transcript of the evidentiary hearing before it, determined that appellant was not entitled to relief and that the determination of the matters in issue by the state court were fairly supported by the record before it.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the validity of a search of an automobile being utilized in a crime, subsequent to the time that the driver and occupant had been arrested and removed from the scene where the automobile was left unattended. The automobile was then, within twenty minutes, taken to the place where the driver and occupant were being detained, and

searched at that location. The chain of circumstances leading from the arrest of the driver and occupant of the car to the subsequent search of the vehicle were all an integrated part of the procedure whereby the suspected felons were arrested and safely transported to jail.

This case is important because it requires interpretation of two decisions of this Court, *Preston* v. *United States,* 376 U.S. 374 (1964), and *Cooper* v. *California,* 386 U.S. 58 (1967). It is also significant, as will be demonstrated subsequently, that the several circuit courts of appeal are in apparent disagreement over the application of *Preston* and *Cooper* to a factual situation such as that set out in this case, and consequently have rendered what appear to be conflicting decisions on the matter.

The Search Conducted of Respondent's Car Twenty Minutes After His Arrest Was Valid As Being Incidental to and Substantially Contemporaneous with That Arrest.

Initially, we must make several observations concerning the status in which this case is presented. Wood was arrested December 30, 1961. Thus, the facts upon which a decision in this cause depend occurred prior to the decisions in *Preston* and *Cooper* and prior to the recent decision in *Chimel* v. *California,* 395 U.S. 752 (1969). Since we view this Court's decisions in both *Preston* and *Cooper* as simply being an extension of the reasonableness rule enunciated in *Rabinowitz* v. *United States,* 339 U.S. 56, 60, 64 (1950), there will be no need to consider the possible retroactive effect of such decisions. However, *Rabinowitz* was in part overruled in *Chimel.* Should *Chimel* be held retroactive and thus apply to the facts of this case, then petitioner concedes that the decision of the circuit court must stand. Upon the authority set forth in *Desist* v. *United States,* 394 U.S. 244 (1969), we assume that *Chimel* will not be held to operate retroactively. Since

the question of *Chimel's* retroactive application is presented to this Court in a petition for rehearing in the case of *Chimel* v. *Califoria,* October Term, No. 770, and has not been decided as of this date, we will not unduly prolong this brief by reconsidering the authorities relevant to that issue. The State of Kansas joined with the State of California in the petition for rehearing and adopts the argument set out in respondent State of California's brief on that issue.

We thus will ignore all consideration of *Chimel* as applying to the merits of this case.

The foregoing considerations are extremely significant because the circuit court in this case, when it reversed the judgment of the federal district court and determined that the search of the vehicle was invalid, relied heavily on the conclusion that the feasibility of obtaining a search warrant was, in contravention of the rule set out in *Rabinowitz,* of primary significance. See *Wood* v. *Crouse,* No. 125-68, p. 9. (Appendix, page A6). *Rabinowitz* held that the only consideration relevant to determining the validity of the search "turn[ed] upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required." *Rabinowitz, supra,* at 65-66. Under that rule, which specifically governed the validity of the search made in this case on December 30, 1961, the only question is whether or not the search was reasonable as an incident of a lawful arrest (for the validity of the arrest has never been questioned), and not subsidiary questions such as whether or not a warrant could have been obtained.

On the facts, we believe the course of conduct pursued by the officers involved in investigating this case was entirely reasonable. Admittedly, Wood's automobile was

searched twenty minutes after he had been arrested and taken to the police station. However, Wood was the subject of a specific criminal charge for specific occurrences occurring immediately prior to the time he was arrested. Wood was the driver of a car which had been specifically identified as containing a person who had attempted to cash stolen checks. The description of the car was sufficient that a reasonable man would conclude the identified car and the car Wood was driving were the same. After the car had been stopped by the Sheriff of Rice County, Wood was arrested immediately as he got out of the car. His person was immediately searched, and one of the stolen checks was found in his breast pocket. Another man was riding in the front seat of the vehicle being driven by Wood. At the scene at the time of the arrest were the Sheriff of Rice County and a Lyons, Kansas, police officer, each driving his own car. No other officers were present or arrived at the scene until Trooper Murphy later arrived and, after receiving the car keys, drove Wood's car to the county jail. Sheriff Kline had a choice after he had arrested Wood and searched him. He and the other officer could attempt to maintain control over the two arrested individuals and complete their investigation at the scene, or transport the individuals to the nearest jail and continue the investigation whenever feasible. Sheriff Kline decided to take one of the criminals to jail with him, and Officer Samuels transported the other. The car was left by the side of the road on U.S. Highway 56 outside the city limits of Lyons, Kansas. Was it unreasonable for Sheriff Kline or Officer Samuels to immediately take Wood and Wyatt to the Rice County Jail in Lyons? Rapidly transporting any arrested criminal defendant to a police station to have him booked, advised of his rights, allow him to secure counsel, or if provided by state rule take him before a magistrate, or interrogate him under proper circum-

stances, is extremely reasonable. As a matter of fact, if significant delay were occasioned, it would probably be subject of complaint by the defendant.

Would it be reasonable for one law enforcement officer to hold two arrested criminals while the second officer conducted a thorough search of the vehicle the suspects had been driving on the shoulder of a U.S. highway outside of town? Regardless of whether or not this could be accomplished as a practical matter, it is respectfully submitted that either this course of action or immediate transportation of the suspects to the nearest jail is reasonable. Is it unreasonable for each officer to take one of the criminal defendants to the police station, leaving the suspect car on the side of the road? We think not. It is reasonable for the officers to believe that for safety purposes one officer should not take both defendants to the jail. Then, was it unreasonable for Sheriff Kline to request the nearest police officer, Trooper Murphy, to take the keys from someone who brought them to the car, and immediately drive the car to the police station without either having permission to enter the car or securing a search warrant from a magistrate at 7:00 o'clock at night? We think that there would not be disagreement that this action is reasonable. Was it then unreasonable for Trooper Murphy, while he was sitting in the car immediately after he had transferred it to the police station, to look under the front seat and under a floor mat, not the lining of the floor, without a search warrant? Again, irrespective of considerations as to the feasibility of obtaining a search warrant to continue the investigation already commenced, and irrespective of any other course of action, it would seem to be reasonable to continue the investigation already commenced within a short time after the arrest by conducting the search in this manner. The entire investigation was obviously closely interrelated.

The factual situation presented in this case distinguishes it from that in *Preston* v. *United States, supra.* Here, the criminal investigation, including the search of the automobile, was all an integrated part of the initial arrest, detention, and securing of the suspected felons. The fact that the search was not conducted immediately at the time Wood was arrested does not detract from that conclusion. The search was conducted as soon as there were enough police officers available to (1) safely secure two suspected felons, transport them to the nearest jail, and (2) then search the automobile in which the two suspected felons had been riding and which had been described as containing someone allegedly attempting to pass stolen checks. There was obviously a close connection between the arrest, the transportation of the automobile to the police station, and its immediate but subsequent search. We respectfully submit that such a practice is not unreasonable.

The circuit court, in reversing the district court's decision, relied primarily upon *Preston* v. *United States, supra.* In *Preston,* this Court was confronted with a factual situation where the criminal suspects were reported by a telephone complaint to be acting suspiciously in a motor car. Four police officers immediately went to the place where the car was parked and located Preston and his companions. The officers questioned the three men while they were parked there, but the men gave answers which the officers testified were unsatisfactory and evasive. The three men were arrested for vagrancy, searched for weapons, and taken to police headquarters. The car, which had not been searched at the time of the arrest, was driven to the police garage and subsequently searched by the officers. In concluding that the search was invalid, this Court noted that the "search was *too* remote in time or place to have been made as incidental to the arrest. . . ."

Preston, supra, p. 386. (Emphasis supplied) The factual distinctions from Wood's case are obvious. Preston and his companions were not associated at the time of their arrest with any particular crime, and were as a matter of fact charged only with the crime of vagrancy. The search in *Preston* was purely an exploratory search, looking for any evidence of any crime which might link Preston and his companions to that crime. In effect, the criminal charges upon which Preston was convicted resulted not from an arrest and a subsequent search connected with that arrest, but from evidence seized pursuant to an exploratory search completely unrelated to the charges upon which Preston may have been properly detained. These distinctions are crucial in determining the reasonableness of the search. Further, in Wood's case, the removal of the suspected felons to the police station, the subsequent removal of the car to the police station, and subsequent search, were all reasonable actions taken by the two law enforcement officers who happened to effectuate the arrests. There is no indication from the opinion in *Preston* that the same situation existed in that case.

We believe the fact that the search was not related to the arrest in *Preston* is extremely significant. This Court emphasized that fact in the subsequent decision of *Cooper* v. *California, supra,* l.c. 61. In *Cooper,* where the automobile was searched subsequent to the arrest, the subsequent search, conducted a week later, was authorized as an exception to *Preston* because under California law the police had lawful custody of the vehicle. This Court also noted: "Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." l.c. 61. In Wood's case, while respondent does

not contend that the police confiscated the car transporting Wood and his companion, we do believe that a similar distinction from *Preston* exists, since the search was directly related to the crime for which Wood was arrested; since the search followed in a normal course the arrest of Wood, even though Wood had been removed to the county jail as had the vehicle; and since the search was substantially contemporaneous with the arrest.

The distinction asserted by petitioner in this case has been recognized by several of the circuit courts of appeal subsequent to the decision in *Preston.*

In *United States* v. *Dento,* 382 F.2d 361 (3rd Cir. 1967), *cert. denied* 389 U.S. 944 (1967), *rehearing denied* 389 U.S. 997 (1967); a search of an automobile was conducted twenty minutes after the arrest of the accused. Noting superficial resemblance between *Dento* and *Preston,* the Third Circuit commented in distinguishing its case that (1), the removal of the car following its seizure was necessary to avoid the flow of highway traffic on a State Highway, and (2) that car was not taken to the police station in order to conduct a "fishing expedition" for evidence. *Dento, supra,* p. 365.

> ". . . there was a reasonable nexus between the offense the defendant was arrested for and the search of his automobile, whereas in Preston the search was entirely unrelated to the arrest on the charge of vagrancy." *Dento, supra,* p. 366.

The Third Circuit again upheld this distinction in *United States, ex rel. Foose* v. *Rundle,* 389 F.2d 54 (3rd Cir. 1968). In that case the accused was arrested and approximately ten to fifteen minutes later, a search was conducted at the police station to which he had been taken. Again, *Preston* was distinguished, based on the facts of *Foose,* because:

> "[T]here was a reasonable nexus between the offense the defendant was arrested for and the search of his automobile, . . . [unlike] Preston [where] . . . the search was entirely unrelated to the arrest or charge of vagrancy." *United States, ex rel. Foose, supra,* p. 55.

The same line of reasoning upheld the validity of the search of a vehicle an hour subsequent to the arrest of the accused, after the vehicle had been removed to the police station, while the accused was present, in *Arwine* v. *Bannan,* 364 F.2d 458, 470 (6th Cir. 1965).

> "We are of the view that the arrest and search, in this case, were units of an integrated incident, and, regardless of hair-splitting distinctions of contemporaneity, were incident to the lawful arrest." *Arwine, supra,* pp. 470-471.

See also *Crawford* v. *Bannan,* 336 F.2d 505, 506-507 (6th Cir. 1964); *United States* v. *Thomas,* 289 F. Supp. 364, 365 (D.C.S.D.N.Y. 1968).

These cases must be premised on the conclusion that a subsequent search of an automobile after it is removed from the place where the defendant is arrested is not *per se* unreasonable, but that there may be circumstances which either justify the delay, *or* the search is so closely related to the charges upon which the defendant was arrested and the continuing investigation of that crime, that the subsequent search can reasonably be said to be contemporaneous with and an incident of the arrest.

The foregoing cases have subsequently been cited with approval. See *Leffler* v. *United States,* 409 F.2d 44, 48 (8th Cir. 1969); *United States ex rel. Chambers* v. *Maroney,* 408 F.2d 1187, 1192-93 (3rd Cir. 1969); *McCoy* v. *Cupp,* 298 F. Supp. 329, 330-31 (D.C. Ore. 1969). Certiorari has now been granted in *Maroney,* 38 L.W. 3173 (Nov. 11, 1969), *supra.* In addition, certiorari has been denied in

at least two instances where factual situations resembling the present one were held sufficient to justify the validity of a search subsequent to an arrest at a later time and place. See *People* v. *Weaver*, 243 N.E.2d 245 (Ill. 1968), *cert. denied* 395 U.S. 959 (1969); *People* v. *Migara*, 236 N.E.2d 693 (Ill. 1968), *cert. denied* 393 U.S. 925 (1968).

It is respectfully submitted that the cases noted previously present a reasonable and proper approach to the problem confronting law enforcement officers in situations such as Wood's case. We also recognize that different considerations exist when the facts reveal either that the search was completely remote and not part of an integrated incident relating to the arrest (See *Sisk* v. *Lane*, 331 F.2d 234, 237 [7th Cir. 1964], where the search occurred six days after the arrest), or where the search was not in any way related to the arrest. See *e.g.; Dyke* v. *Taylor Implement Manufacturing Company, Inc.*, 391 U.S. 216, 220, 221-222 (1968).

Contrary to the decisions cited previously affirming the validity of a search similar to the one conducted in Wood's case is the decision of the Tenth Circuit in *Wood* v. *Crouse*, *infra*, appendix A1, and *United States* v. *Harvey*, 397 F.2d 526, 528 (7th Cir. 1968) (although *Harvey* may not be such a blanket prohibition as Wood on its facts) which hold on their face that any removal of a vehicle from the scene of an arrest at a time when the occupants of the car are in custody would require the issuance of a search warrant to justify validity of the subsequent search. Such rule is contrary to the rule set out previously establishing a *standard of reasonableness* to determine the validity of any search.

CONCLUSION

This case presents an extremely significant issue concerning interpretation of prior decisions of this Court relating to the search of an automobile subsequent to the time its driver or occupant is arrested, but yet still part of an integrated incident relating to the arrest, and one which has resulted in conflicting decisions in the various circuit courts of appeal, thus requiring the finality of a decision of this Court. Consequently, it is respectfully submitted that this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

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United States Court of Appeals

TENTH CIRCUIT

JULY, 1969, TERM

WILLIAM NAY WOOD,
Appellant,

vs.

SHERMAN H. CROUSE, Warden, Kansas State Penitentiary, Lansing, Kansas,
Appellee.

Number 125-68

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(District Court No. L-257 Civil)

(Filed October 7, 1969)

Duane F. Wurzer, Denver, Colorado, for Appellant;

Edward G. Collister, Jr., Assistant Attorney General, Topeka, Kansas, (Kent Frizzell, Attorney General, Topeka, Kansas, on the brief) for Appellee.

Before TUTTLE, Senior Circuit Judge,* and HILL and HOLLOWAY, United States Circuit Judges.

HILL, Circuit Judge.

The appellant was convicted by a jury in the state district court of Barton County, Kansas, of burglary, larceny, forgery and two counts of uttering a forged instrument and sentenced to five concurrent thirty year terms under the state habitual criminal statute. On appeal, the Kansas Supreme Court sustained the conviction on two sep-

*Of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

arate occasions, State v. Wood, 378 P.2d 536 (Kan. 1963) and 416 P.2d 729 (Kan. 1966). Appellant then sought a writ of habeas corpus in federal district court and was denied relief on the ground that he had not exhausted state remedies. After this court reversed and remanded for an evidentiary hearing,[1] the district court determined that although the question was a close one, the search of the automobile appellant had been driving when arrested was not invalid, and even if it were, the admission of the evidence thereby obtained was harmless error.

The facts are not disputed and indicate that the Dr. Pepper Bottling Company in Great Bend, Kansas, was burglarized on December 29, 1961, and a typewriter, check protector and check book were stolen. The next evening, Sheriff Kline of Rice County, Kansas, was officially advised to watch for a certain described vehicle whose occupants had attempted to pass a check suspected of being one of those taken in the burglary. The sheriff proceeded west of Lyons, Kansas, where he observed the automobile appellant was driving, followed the vehicle into Lyons, and radioed his co-officer Samuels that he would stop the car at the edge of the city. The automobile was then stopped and the appellant was arrested as he emerged from the driver's seat. Both the appellant and one Jesse Wyatt, a codefendant in the state trial, were searched by officer Samuels who had joined in the arrest. The search uncovered a Dr. Pepper Bottling Company check in appellant's shirt pocket (later introduced in the trial as state's exhibit 4). There was, however, no search of the automobile at that time.

Shortly after the appellant and Wyatt were taken to the county jail, Kansas Highway Patrol Trooper Murphy

1. Wood v. Crouse, 389 F. 2d 747 (10th Cir. 1968); see also, Wood v. Crouse, 327 F.2d 81 (10th Cir. 1964).

noticed the abandoned vehicle on the side of the highway. After communicating with the sheriff and obtaining the keys to the car, Murphy drove the vehicle to the jail where approximately twenty minutes after the appellant had been arrested, the vehicle was searched for the first time. It was then that Murphy discovered one signed check under the right front seat (state's exhibit 3) and seventeen executed but unsigned checks together with seventy-five blank checks under the right front floor mat (state's exhibits 1 and 2).

The State seeks to sustain Murphy's search as being made incident to appellant's arrest. Appellant counters by conceding that his arrest was valid, there being probable cause, but contending that the belated search of the vehicle was not incidental to the arrest, and absent a search warrant, violated the Fourth Amendment. He further asserts that the fruits of the unlawful search—some 93 checks—contributed to his conviction on each of the five counts, thus precluding an application of the harmless error rule.

Appellant relies primarily upon Preston v. United States, 376 U.S. 364 (1964), to sustain his contention that the search was not contemporaneous with his arrest. In Preston the search of the automobile of the defendants soon after it had been taken to a police garage and the defendants charged with vagrancy, was declared to be "too remote in time or place to have been made as incidental to the arrest. . . ." 376 U.S. at 368. The Court observed that the justification for an incidental search—the need to protect the arresting officers, prevent escape, and preserve evidence—no longer applies after the vehicle and its occupants are safely committed to police control. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

We note, parenthetically, that both the search and the state criminal trial in the instant case occurred prior to the date of the Preston decision. There is, however, no need to be concerned with the propriety of a retroactive application of Preston inasmuch as the case merely reaffirmed principles previously announced by this court and others.[2] "Even before . . . Preston . . . it was clear that a warrantless search of a car in police custody at a time after the occupants' arrest and under circumstances where there is no danger of removal is illegal. * * * The Supreme Court's holding to the same effect in *Preston* puts the matter to rest." Smith v. United States, 335 F.2d 270, 273 (D. C. Cir. 1964). Indeed, several courts, including this one,[3] have applied Preston retroactively without discussing the problem, thereby giving at least implicit recognition to the fact that Preston did not represent a clear break with the past and therefore does not properly present a question of retroactivity.[4]

Clearly then, the holding in Preston is controlling unless it can be meaningfully distinguished from the case at

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2. *E.g.*, Williams v. United States, 323 F.2d 90 (10th Cir. 1963); Hart v. United States, 162 F.2d 74 (10th Cir. 1947); Shurman v. United States, 219 F.2d 282 (5th Cir. 1955). Apparently, both the appellant and the State recognized the absence of an issue of retroactivity since neither side mentioned the matter. But see, State v. Wood, 416 P.2d at 733, where the court raised the question without deciding it.

3. Simpson v. United States, 346 F.2d 291 (10th Cir. 1965); United States v. Marrese, 336 F.2d 501 (3d Cir. 1964); United States v. Cain, 332 F.2d 999 (6th Cir. 1964); Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Smith v. United States, 335 F.2d 270 (D. C. Cir. 1964); and Bowling v. United States, 350 F.2d 1002 (D.C. Cir. 1965).

4. In Desist v. United States, 394 U.S. 244, (1969), the Court stated: "However clearly our holding in Katz may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future." The clear implication is that there is no need to consider retroactivity unless there has been "a clear break with the past."

bar. This the State attempts to do by relying on United States v. Dento, 382 F.2d 361 (3d Cir. 1967), where the search of the defendant's vehicle after he had been arrested and the car driven to the police station, was upheld. The court distinguished Preson on two grounds: "First, unlike Preston the instant search was substantially contemporaneous with the arrest (the entire arrest and search procedure was completed within twenty minutes). Secondly, there was a reasonable nexus between the offense the defendant was arrested for and the search of his automobile, where as in Preston the search was entirely unrelated to the arrest on the charge of vagrancy." 382 F.2d at 365-66. United States ex rel. Foose v. Rundle, 389 F.2d 54 (3d Cir. 1968), and Arwine v. Bannan, 346 F.2d 458 (6th Cir. 1965), also relied on by the State, purport to make the same distinctions.

This court cannot be persuaded by such artificial attempts at distinction without a difference. The Court in Preston in no way indicated that the time factor, *i.e.*, the precise time period between arrest and search, was to be controlling. In fact, the Court did not indicate the amount of time involved except to note that the search was "soon after" the defendants had been booked at the station. Timing is significant only in the sense that the search is either at the time of the arrest or it is not; if it is not, it is irrelevant whether the elapsed time is twenty minutes or twenty hours. Rather, the crucial distinction, clearly indicated in Preston, is that if the search is not made at the time of the arrest, but is conducted at a later time when the vehicle is in custody and its occupants in jail, then the justification for an incidental search *e.g.*, the need to preserve evidence, protect the arresting officers, and prevent escape, no longer obtains and a warrant must be secured. Obviously, the absence or presence of a justification for the search will not depend solely upon whether the delay is

brief or lengthy. Accordingly, it is the existence or non-existence of a justification for a warrantless search—not the mere passage of time—that is determinative.

The second distinction attempted in Dento, namely, analysis of the nature of the relationship between the offense prompting the arrest and the later search, can have significance in determining whether the search was reasonable only as it relates to probable cause. The court in Dento must have intended to indicate that the subsequent search is valid when closely related to the reason for the arrest because when so related there is probable cause for the search. *Cf.*, United States v. Butenko, 384 F.2d 554, 566 (3d Cir. 1967), vacated, 89 S.Ct. 961. The difficulty with that position is that it misconceives the function of probable cause in this context. Thus, the fact that officers have probable cause does not dispense with the requirement of a search warrant. Chapman v. United States, 365 U.S. 610 (1961). Consequently, it is not the existence of probable cause, but the presence of factors justifying the failure to procure a warrant that is critical.[5] When so viewed it becomes apparent that the relationship between the offense and the search is of no consequence since that relationship can have little bearing on the feasibility of first obtaining a search warrant.[6] In brief, both dis-

5. The reasoning in Dento is apparently the same as that employed by Mr. Justice White, dissenting in Chimel v. California, U.S. (1969), with but one prominent exception. White, J., observed that when, in addition to the probable cause sustaining the arrest, there is independently established probable cause that "would justify a warrant for a broader search for evidence," the search should be sustained, if and only if, there are exigent circumstances justifying police action." "It is agreed that such a warrant would be required absent exigent circumstances." U.S. at

6. Of course, "the scope of a search contemporaneous with a legal arrest must have a reasonable relationship to the protection of the officer or the crime for which the accused was arrested." United States v. Humphrey, 409 F.2d 1055, 1058 (10th Cir. 1969). In that sense then, the relationship between the search and the offense is of importance.

tinctions propounded in Dento overlook the fact that a search without a warrant is valid if incidental to an arrest only because the need to protect the officers, and other similar practical considerations, justify an exception to the general requirement that a warrant is a precondition to a valid search. When the justification is lacking, as in the case at bar where the vehicle was in police custody and its occupants in jail, then regardless of the time involved or the existence of probable cause for the search, a search without a warrant is simply not incident to the arrest.[7] We must therefore conclude "that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." Preston v. United States, 376 U.S. at 368.

There remains for consideration the question of whether the admission of the unlawfully obtained evidence, state's exhibits 1, 2 and 3, consisting of 93 checks in vary-

7. Preston v. United States, 376 U.S. at 367; Dyke v. Taylor Imp. Mfg. Co., Inc., 391 U.S. 216 (1968); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965); Williams v. United States, 323 F.2d 90 (10th Cir. 1963) cert. den. 376 U.S. 906; Barnett v. United States, 384 F.2d 848 (5th Cir. 1967); Shurman v. United States, 219 F.2d 282 (5th Cir. 1955) cert. den. 349 U.S. 921; United States v. Cain, 332 F.2d 999 (6th Cir. 1964); United States v. Harvey, 397 F.2d 526 (7th Cir. 1968); Westover v. United States, 342 F.2d 684 (9th Cir. 1965), reversed on other grounds, Miranda v. Arizona, 384 U.S. 436 (1966); Bowling v. United States, 350 F.2d 1002 (D.C. Cir. 1965); Smith v. United States, 335 F.2d 270 (D.C. Cir. 1964); and see generally, Annot., 19 A.L.R. 3d 727 (1968). Preston and similar decisions have been subjected to some criticism based on the subjective belief of the critic that it is ridiculous to invalidate a search undertaken a short time after an arrest has been made. Thus, as in the brief of the State in the present case, emphasis is placed on the alleged insignificance of whether a search is made at the scene or a few minutes later at a police station. Yet the critical fact, often overlooked, is that the Fourth Amendment was designed to interpose a magistrate, whenever possible, between the citizen and the police. Viewed in that light, the emphasis is more properly on the reasonableness of the arresting officer's basis for avoiding a warrant and thereby circumventing the theoretically objective scrutiny of a disinterested magistrate. See, Chimel v. California, ____ U.S. ____ (1969).

ing stages of completion, can be said to have constituted harmless error. To recapitulate, the appellant was charged and convicted on five felony counts: second degree burglary, grand larceny, forgery of state's exhibit 4, and twice uttering a forged instrument (state's exhibit 4). State's exhibit 4, it will be recalled, was the check discovered in appellant's shirt pocket, admittedly admissible and unchallenged by the appellant. This led the district court, adopting the reasoning in State v. Wood, 416 P.2d 729, 734 (Kan. 1966), to determine that the forgery and two uttering counts were based exclusively on exhibit 4, with the inadmissible evidence, exhibits 1, 2 and 3, being material only to the burglary and larceny counts. Reasoning that exhibit 4 was of equal materiality in obtaining the burglary and larceny convictions, the court concluded that the 93 checks were merely cumulative in nature, not the basis for appellant's convictions, and not prejudicial to the substantial rights of the appellant. We must emphatically disagree.

Contrary to the approach taken by the district court, Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), teaches that when considering a question of harmless error, "we are not concerned . . . with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Further elaboration in Chapman v. California, 386 U.S. 18, 24 (1967), disclosed that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The result is that before we find harmless error, we must conclude beyond a reasonable doubt that the 93 tainted checks did not contribute to appellant's conviction.

As the case was submitted to the jury, exhibits 1, 2 and 3 were unrelated to the forgery and uttering counts since only exhibit 4 had been forged or uttered. The tainted evidence was supposed to be considered only in connection with the theft of the checks as charged in the burglary and larceny counts. As so considered, it is manifest that such evidence, comprising 93 of the 94 checks introduced, must have influenced the jury and contributed to the conviction.[8] At the very least, it is clear that the State has not shown beyond a reasonable doubt that the inadmissible evidence was not a contributing factor.[9] It follows that there was prejudicial error affecting the burglary and larceny convictions.[10]

Moreover, realism requires that relief be granted as to each of the three remaining counts. Admittedly, in the strict contemplation of law the invalid evidence should not have contributed to the forgery and uttering convictions. Yet in the minds of the jurors, appellant's guilt or innocence of forgery and uttering would be affected by the initial conclusion on the burglary and larceny counts. The case must have appeared as one involving a theft, followed by an attempt to convert the stolen checks into cash; such was the clear implication urged by the State during the trial and cannot now be ignored. Consequently, the conclusion is inescapable that the tainted evi-

8. The district court aptly observed, and we wholeheartedly agree, that federal courts derive little pleasure in disturbing issues previously considered by the highest court of a sovereign state. Nevertheless, in cases such as this where constitutional principles are involved, we have no alternative.

9. The State's appellate brief does not discuss or in any way refer to the harmless error issue. If this was intended as a confession of error it should have been affirmatively stated.

10. A habeas corpus petitioner may attack one or more concurrent and coterminous sentences even though he would not be entitled to immediate release if successful. Rhodus v. Patterson, 404 F.2d 890 (10th Cir. 1968); Sciberras v. United States, 404 F.2d 247 (10th Cir. 1968).

dence might have contributed to the forgery and uttering convictions.

In sum, we conclude that the search of the automobile at the county jail after appellant had been incarcerated therein was in violation of the Fourth Amendment, and the admission into evidence of the fruits of that invalid search contaminated each of the five counts on which the appellant was convicted.

REVERSED and REMANDED with directions to stay the issuance of the writ until the State has had a reasonable opportunity to retry the petitioner.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM NAY WOOD,
Petitioner,
vs.
SHERMAN H. CROUSE, Warden,
Respondent.
Civil No. L-257

Memorandum of Decision

(Filed July 1, 1968)

The petitioner was arrested, tried, and convicted in the State District Court of Barton County, Kansas. The offenses charged and upon which he was convicted by a jury were five in number. They were: (1) burglary in the second degree of the Dr. Pepper Bottling Company at Great Bend, Kansas; (2) grand larceny of a typewriter, check protector, and printed checks from said Dr. Pepper Bottling Company; (3) forgery of a check on said Dr. Pepper Bottling Company in the sum of $113.20; (4) uttering to C. O. Mammel Food Store, Ellinwood, Kansas, the forged instrument described in Count 3; and (5) utter-

ing at the H. & H. I.G.A. Grocery Store, Ellinwood, Kansas, the forged instrument described in Count 3. In addition to these five counts, the Information originally contained a sixth count alleging forgery of a check on the Dr. Pepper Bottling Company in the sum of $94.15, but this count was dismissed by the prosecution prior to the submission of the case to the jury.

After conviction, it appeared that petitioner had been previously convicted of other felonies and provisions of the Habitual Criminal Act of Kansas were invoked and petitioner was sentenced to serve a term of thirty (30) years on each count, the sentences to run concurrently. Petitioner took an appeal to the Kansas Supreme Court from this conviction contending, among other things, that evidence had been received at the trial, over his objection, which evidence had been obtained by an unlawful search and seizure in violation of his constitutional rights. Other points were raised and considered by the Kansas Supreme Court in that appeal. The conviction of the petitioner was affirmed by the Kansas Supreme Court in its opinion filed and reported in 190 Kan. 778, 378 P.2d 536. Thereafter, petitioner having appeared pro se in his first appeal, the Kansas Supreme Court, noting that he had been denied counsel in his first appeal, reinstated the proceeding, appointed counsel to represent petitioner, and again considered the issues raised, including the proposition that, as petitioner contended, a reversal of the judgment and conviction was required because of the admission of the evidence at petitioner's trial which had been secured by an unreasonable search and seizure of an automobile he had been driving at the time of his arrest. The Kansas Supreme Court after again considering the case, determined in its opinion, reported in 197 Kan. 241, 416 P.2d 729, that the evidence was not obtained illegally, that it was only

cumulative in nature and did not affect the substantial rights of the defendant, and, therefore, could not be reversible error. Petitioner's conviction on the five charges and his sentences imposed on each of them were again upheld and affirmed.

Petitioner, thereafter, sought relief under provisions of K.S.A. 60-1507, the state equivalent to 28 U.S.C. §2255. Relief was denied by the sentencing court and petitioner, electing not to appeal from this denial, filed the action now pending before this Court, contending that his rights were violated when a number of stolen checks were received in evidence at his state court trial, over his objection, which evidence had been found by the officers in an unreasonable and illegal search of an automobile which he was driving at the time he was arrested by the officers.

This Court dismissed petitioner's action without a hearing on the grounds that petitioner had not exhausted his state remedies because he had taken no appeal from the denial of his 1507 motion to the Kansas Supreme Court. He appealed this Court's dismissal of his action to the Court of Appeals. That court reversed the order of dismissal on the basis that in Kansas procedure, when an issue has been decided on direct appeal, it will not be reexamined in a state post conviction proceeding. *Miles* v. *State*, 195 Kan. 516, 407 P.2d 507, was cited by the Court of Appeals as establishing this rule, thus making unavailable any post conviction remedy by which petitioner could obtain a review of what he insists was a violation of his constitutional rights requiring a vacation of his conviction on the charges filed and upon which he was tried in the Barton County, Kansas State Court. The Court of Appeals directed that the petitioner be granted an evidentiary hearing on this question of whether the search made of the automobile he was driving at the time of his arrest was reasonable.

Such a hearing was afforded petitioner for whom counsel was appointed to assist him in presenting his case. At the hearing there was introduced transcripts of the trial proceedings and of the hearing on petitioner's motion to vacate in state court under K.S.A. 60-1507. Also submitted, was an abstract of the record filed in the Kansas Supreme Court in connection with the reinstated appeal in that court, and a certified copy of the Journal Entry of Judgment and sentence entered by the Barton County, Kansas State Court.

Counsel for petitioner and the state were granted leave to file briefs and memorandums to assist the Court in making a determination of the issue involved. These have been received and the Court is grateful for the assiduous efforts displayed by counsel.

There seems to be little dispute concerning the basic facts. The facts detailed in the opinion of the Kansas Supreme Court reported in the case of *State* v. *Wood*, 190 Kan. 778, 378 P.2d 536, are substantially correct and are adopted by this Court as the facts necessary to consider the issue raised. At the trial in the state court, four separate exhibits were introduced by the state and received in evidence. Exhibit 4 was a check found by the officers in petitioner's shirt pocket when he was stopped on the highway, placed under arrest and searched. This check was in the amount of $113.20, and was the basis of the charges contained in counts 3, 4, and 5 of the Information upon which petitioner was tried.

Count 3 charged petitioner with forging the check identified as Exhibit 4; Count 4 charged petitioner with offering to utter and pass Exhibit 4 as a falsely made check to C. O. Mammel Food Stores; and Count 5 charged him with offering to utter and pass Exhibit 4 as a falsely made

check to the H. & H. I.G.A. Grocery Store. Thus, Exhibit 4 was the basis of the charges in counts 3, 4, and 5 of the Information. Exhibit 3 was a check found by Trooper Murphy under the right front seat of the automobile. Exhibits 1 and 2 were the check blanks of the Dr. Pepper Bottling Company, identified by Trooper Murphy as objects found in his search of the automobile.

The matter before this Court is one that should be determined by the state courts. The sentencing court, when considering petitioner's motion under K.S.A. 60-1507, concluded that under the *Miles* decision, supra, he could not hear and pass upon any issue which was considered on direct appeal from the petitioner's conviction. While this Court recognizes that there may be sound reason for the adoption by the Kansas Supreme Court of its Rule 121 (194 Kan. XXVII), the effect of which is to eliminate consideration of any case by a trial court where, on direct appeal from conviction, the judgment and sentence of a prisoner has been affirmed, the failure of the sentencing court to conduct an evidentiary hearing on the issue here involved and make findings and conclusions necessary, casts on this Federal Court the duty and responsibility of doing so. This Court, under mandate of the Court of Appeals, has no choice but to proceed.

At the evidentiary hearing afforded petitioner by this Court, only the transcripts and records described above were offered and received in evidence, so this Court is in substantially the same position as was the Kansas Supreme Court when it twice considered the same contentions now raised by petitioner. Petitioner relies on the case of *Preston* v. *United States*, 376 U.S. 364, to sustain his contention that the search of the automobile he had been driving at the time of his arrest took place after he and his companion had been arrested and taken to the police sta-

tion, after the vehicle had been permitted to stand unattended and unlocked on a public highway for a short period of time, and then removed to the grounds of the Rice County Jail by the officers where it was searched by Trooper Murphy some twenty minutes after petitioner's arrest and confinement in jail. The search took place out of the presence of petitioner and at a different location than where he had been placed under arrest. Some of the stolen articles were found under a floor mat in the vehicle and were not visible until the search was made. No search warrant had been obtained and no reasons offered by the officers for not obtaining one.

It is obvious that the Kansas Supreme Court gave careful consideration to the issues presented here. That Court had before it the same record which has been submitted to this Court in order for it to pass on the same questions. Petitioner asks this Court to overrule the decision of the Kansas Court whose distinguished members have had wide judicial experience. Five of its seven members served as trial court judges before their elevation to the Supreme Court, one was an Attorney General of the State. All were practicing attorneys with substantial trial experience prior to their judicial elections. This Court is extremely reluctant to substitute its judgment for that of the highest state court within its jurisdiction. It is clear that the question of whether the search made by Trooper Murphy was unreasonable, absent a search warrant, is a close one. Courts considering substantially the same facts and circumstances have arrived at different conclusions. This Court cannot say the Kansas Court's interpretation of the facts before it was wrong.

But the conviction of petitioner was on counts 3, 4 and 5 of the Information. These convictions on the three counts mentioned were sustained by the Kansas Supreme Court

on the basis that Exhibit 4, the check found in petitioner's shirt pocket at the time of his arrest, the discovery of which was made by the officers at the time of his apprehension, and about which no complaint is offered with regard to its removal from petitioner's person by the officers, was properly admissible in evidence in any event and supports petitioner's conviction on the three counts mentioned.

If any one of the counts upon which petitioner was convicted can be sustained, then petitioner's claim must be denied because his sentences on each count were the same and were directed to be served concurrently.

The Kansas Supreme Court, in effect, determined from the same record now before this Court that admission of evidence in the trial of petitioner's case, even assuming that it was secured by an unreasonable search and seizure, was merely cumulative in its nature, was not the basis for petitioner's conviction, and did not result in prejudice to or affect the substantial rights of the petitioner and was not reversible error.

This Court has reviewed the opinion of the Kansas Court. *State* v. *Wood*, 197 Kan. 241, and particularly the portion beginning at the bottom of page 246 (headnote 6, middle of page 733, in 416 P.2d), and has read the decisions there cited and has considered as well the decisions cited by counsel in their respective briefs and memorandums. This Court cannot make a determination from the same trial record considered by the Kansas Court that is contrary to the conclusion reached by that Court but must conclude the decision of that Court to be correct.

It is not necessary to repeat what was said by the Kansas Court in reaching that decision. This Court believes the reasoning to be sound and the conclusion correct, and so finds and determines.

It follows that the claim of the petitioner must be denied and that his action be dismissed and the writ discharged.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 27th day of June, 1968.

/s/ George Templar
United States District Judge